EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

William F. Weld, Governor
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Vol. 10 , Edition No. 1
November, 1993

LAND USE MANAGER

CHANGING LOT LINES ON APPROVED SUBDIVISION PLANS

Under the Subdivision Control Law, one method for amending a previously approved subdivision plan is found in MGL, Chapter 41, § 81W, which provides in part that:

> "A planning board, on its own motion or on the petition of any person interested, shall have the power to ... amend ... its approval of a plan of a subdivision ... . All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the ... amendment ... of such approval and to a plan which has been changed under this section."

Another method for amending a previously approved subdivision plan can be found in MGL, Chapter 41, § 81O which provides in part that:

> "After the approval of a plan ... the number, shape and size of the lots shown on a plan so approved may, from time to time, be changed without action by the board, provided every lot so changed still has frontage on a public way or way shown on a plan approved in accordance with the subdivision control law for at least such distance, if any, as is then required ... and if no distance is so required, has such frontage of at least twenty feet."

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The process for amending a subdivision plan pursuant to § 81W is the same process that a Planning Board must follow when approving the original subdivision plan. Rather than going through the public hearing process, Section 81O allows a developer/landowner, as a matter of right, to change the number, shape and size of lots shown on a previously approved subdivision plan. A developer/landowner may also submit an ANR plan when changing the number, shape, and size of lots shown on a previously approved subdivision plan. What must a Planning Board consider when reviewing an ANR plan where the proposed lots abut a way shown on a plan that has been previously approved and endorsed by the Planning Board pursuant to the Subdivision Control Law ?

Before endorsing an ANR plan where the lots shown on a plan abut such a way, the court has determined that a Planning Board should consider the following:

1. Are the approved ways built or is there a performance guarantee in place, as required by MGL, Chapter 41, § 81U, that they will be built?

2. Was there a condition placed on the previously approved subdivision plan which has not been met or which would prevent further subdivision of the land?

MGL, Chapter 41, § 81U provides several techniques for enforcement of the Subdivision Control Law. A Planning Board, before endorsing its approval of a subdivision plan, is required to obtain an adequate performance guarantee to insure that the construction of the ways and the installation of municipal services will be completed in accordance with the rules and regulations of the Planning Board. The court has decided that a plan is not entitled to an ANR endorsement unless the previously approved subdivision way shown on the ANR plan has been built or there is a performance guarantee assuring that the way will be built.

In Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980), the Board of Selectmen, acting as an interim Planning Board, approved a 26 lot subdivision. The Selectmen did not specify any construction standards for the proposed ways, nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee. Eighteen years after the approval of the subdivision plan by the Board of Selectmen, Richard submitted an ANR plan to the Planning Board. During the 18 year period, the locus shown on the ANR plan had been the site of gravel excavation so that it was now 25 feet below the grade of surrounding land. The Planning Board refused to endorse the plan. The central issue before the court was whether the lots shown on the ANR plan had sufficient frontage on ways that had been previously approved in accordance with the Subdivision Control Law. The court found that to be entitled to the ANR endorsement, when

a plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards. Since there was no performance guarantee, Richard's plan was not entitled to ANR endorsement.

A Planning Board, when approving a subdivision plan, has the authority to impose reasonable conditions. A Planning Board may impose a condition which can result in the automatic rescission of a subdivision plan. A Planning Board may also impose a condition which can limit the ability of a developer/landowner to further subdivide the land shown on the plan without modifying or rescinding the limiting condition through the § 81W process. Therefore, in reviewing an ANR plan where the proposed lots abut a previously approved subdivision way, a Planning Board should check for the following:

1. Has the previously approved subdivision plan expired for failure to meet a specific condition?

2. Does the previously approved subdivision plan contain a condition which prevents the land shown on the plan from being further subdivided?

The issue of an automatic rescission of a previously approved subdivision plan was discussed in Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971). In that case, the Planning Board approved a subdivision plan on the condition that the developer complete all roads and municipal services within a specified period of time or else the Planning Board's approval would automatically be rescinded. The Board voted its approval and endorsed the plan with the words "Conditionally approved in accordance with G.L. Chap. 41, Sec. 81U, as shown in agreement recorded herewith." The agreement referred to was a covenant which contained the following language:

> The construction of all ways and installation of municipal services shall be completed in accordance with the applicable rules and regulations of the Board within a period of two years from date. Failure to so complete shall automatically rescind approval of the plan.

After the expiration of the two-year time period, the landowner submitted a plan to the Planning Board requesting an "approval not required" endorsement. The plan showed a portion of the lots that were shown on the previously approved definitive plan which abutted a way which was also

shown on the plan. The landowner's position was that he was entitled to an ANR endorsement since the lots shown on this new plan abutted a way that had been previously approved by the Planning Board pursuant to the Subdivision Control Law. The Planning Board denied endorsement. The court found that the automatic rescission condition was consistent with the purposes of the Subdivision Control Law and that the Planning Board could rely on that condition when considering whether to endorse a plan "approval not required". Since the ways and installation of municipal services had not been completed in accordance with the terms of the conditional approval, the court held that the plan before the Board constituted a "subdivision" and was not entitled to the ANR endorsement. A similar result was also reached in Campanelli, Inc. v. Planning Board of Ipswich, 358 Mass. 798 (1970).

In SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984), the Planning Board approved a definitive subdivision plan with the notation stating that "All building units will be detached as covenanted" and a covenant to that effect was executed. At a later date, the landowner submitted a plan for ANR endorsement showing building lots abutting ways that were shown on the previously approved subdivision plan. The lots shown on the ANR plan were of such a size to accommodate a multi-family housing development. The Planning Board denied ANR endorsement.

SMI INVESTORS(DELAWARE), INC. V. PLANNING BOARD OF TISBURY
18 Mass. App. Ct. 408 (1984)

Excerpts:

Armstrong, J. ...

... the 1973 [definitive] plan was approved subject to a condition that all dwellings erected on the lots shown thereon be detached. The imposition of that condition was not appealed, and its propriety is not now before us. ... The 1981 [ANR] plan showed the same roads but altered lot lines. The plan also showed that the lots are designed to serve multi-family dwellings. The plaintiff asked the planning board to disregard the proposed use, but this it could not demand as of right.

... The application for the § 81P endorsement was necessarily predicated on the approval of the 1973 plan, which remained contingent on acceptance of the condition. As the 1981 plan does

> not contemplate compliance with the condition, it is, in effect, a new plan, necessitating independent approval. We need not consider whether the plaintiff might have been entitled to a § 81P endorsement if each lot shown on the plan had been expressly made subject to the condition on the 1973 plan ... The record in the case before us makes clear that the plaintiff did not seek such a qualified endorsement ... .
>
> It follows that the judge did not err in ruling that the planning board was correct in refusing the § 81P endorsement.

Recently, in Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386 (1993), the court held that the Planning Board did not modify or waive a condition imposed on a previously approved subdivision plan by endorsing a subsequent plan "approval not required." In Hamilton, the Beverly Planning Board approved a five lot definitive plan on the stated condition that "This subdivision is limited to five (5) lots unless a new plan is submitted to the Beverly Planning Board which meets their full standards and approval." Seven years later, Hamilton, an owner of one of the lots shown on the 1982 definitive plan, submitted an ANR plan to the Planning Board. He wished to divide his lot into two lots which would meet the current lot area and lot frontage requirements of the Beverly Zoning Ordinance. The Planning Board endorsed the plan. Thereafter, Hamilton applied for a building permit to erect a single-family residence on one of the newly created lots. The Building Inspector was made aware of the condition noted on the 1982 definitive plan that had limited the subdivision to five lots. On the strength of that limitation, the Building Inspector declined to issue the building permit. On appeal, Hamilton argued that the "approval not required" endorsement superseded the limiting condition imposed on the 1982 definitive plan.

HAMILTON V. PLANNING BOARD OF BEVERLY
35 Mass. App. Ct. 386 (1993)

Excerpts:

Kass, J. ...

> Approval of a subdivision plan involves procedures, including a public hearing (G. L. c. 41, § 81T) as well as open sessions of the planning board at which the proposed division of a tract of land into smaller lots is carefully reviewed so as to meet design criteria and certain policy objectives relating to streets (with emphasis on

maximizing traffic convenience and minimizing traffic congestion), drainage, waste disposal, catch basins, curbs, access to surrounding streets, accommodation to fire protection and policing needs, utility services, street lighting, and protecting access to sunlight for solar energy. ...

The number of lots in a subdivision has a bearing on those considerations. What might be an adequate access road or waste disposal system for five lots is not necessarily adequate for seven or ten. For that reason a planning board may limit the number of lots in a subdivision. ... If it does so, the board must, as here, note the lot number limitation on the approved plan, which becomes a matter of record. Otherwise, under G.L. c. 41, § 81O, the number, shape and size of the lots shown on a plan may be changed as a matter of right, provided every lot still has frontage that meets the minimum requirements of the city or town in which the land is located.

Under G.L. c. 41, § 81W, a person having a cognizable interest may petition the planning board for modification of an approved subdivision plan. Action by a planning board on such a petition for modification incorporates all the procedures attendant on original approval, including, therefore, a public hearing. Section 81W also provides that no modification may affect the lots in the original subdivision which have been sold or mortgaged.

The provisions built into §§ 81T and 81W, which are designed to protect purchasers of lots in a subdivision and the larger public, would be altogether - and easily - subverted if an approved plan could be altered by the simple expedient of procuring a § 81P "approval not required" endorsement. All that is required to obtain such an endorsement is presentation to a planning board of a plan that shows lots fronting on a public street or its functional equivalent, see G.L. c. 41, § 81L, with area and frontage that meet local municipal requirements. The endorsement of such plan is a routine act, ministerial in character, and constitutes an attestation of compliance neither with zoning requirements nor subdivision conditions. ... Restrictions in an approved subdivision plan are binding on a building inspector. ... .

> The limited meaning which may be ascribed to a § 81P endorsement and the ministerial nature of the endorsement defeat the argument of the plaintiffs that the endorsement constituted a waiver of the five-lots limitation - prescinding from the question whether the board, for reasons we have discussed, could waive the limitation, thus altering the plan, without a public hearing. ...

As Judge Kass noted in Hamilton, restrictions in an approved subdivision plan are binding on a building official. Specifically, MGL, Chapter 41, § 81Y provides that a building inspector cannot issue a building permit until satisfied that:

> "... the lot on which the building is to be erected is not within a subdivision, or that a way furnishing the access to such lot as required by the subdivision control law is shown on a plan recorded or entitled to be recorded ... and that any condition endorsed thereon limiting the right to erect or maintain buildings on such lot have been satisfied, or waived by the planning board, ...

MGL, Chapter 41, § 81P further provides that a statement may be placed on an ANR plan indicating the reason why approval is not required under the Subdivision Control Law. As was noted by the court in SMI Investors, if a Planning Board believes its endorsement may tend to mislead buyers of lots shown on a plan, they may exercise their powers in a way that protects persons who will rely on the endorsement. Before endorsing a plan "approval not required" where the proposed lots abut a way shown on a previously approved and endorsed subdivision plan, the Planning Board should review the subdivision plan to see if there is any limiting condition which would prevent the land shown on the subdivision plan from being further subdivided. If no such condition exists but there were other conditions imposed, it may be prudent to place a notation on the ANR plan indicating that the lots shown on the plan abut a way which has been conditionally approved by the Planning Board pursuant to the Subdivision Control Law. Hopefully, this notation will alert a building official to review the previously approved subdivision plan to determine if there is any condition which would prevent the issuance of a building permit. If the subdivision way shown on the ANR plan has not been constructed, the Planning Board should check to make sure that there exists a performance guarantee as required by the Subdivision Control Law. If the construction of such way is secured by a covenant, the Planning Board may want to consider placing a statement on the ANR plan which will alert a future buyer of any lot shown on the plan to the existence of such a covenant. A Planning Board should check with municipal counsel if there is any question concerning the applicability of the covenant to the lots shown on the ANR plan.

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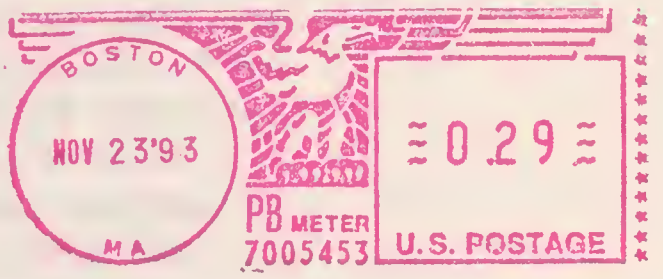

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LAND USE MANAGER

Vol. 10 , Edition No. 2
December, 1993

APPROVAL OF ZONING FRONTAGE BY A PLANNING BOARD

In determining whether a proposed building lot has adequate frontage for the purposes of the Subdivision Control Law, MGL, Chapter 41, § 81L provides that the proposed building lots must front on one of three types of ways:

> (a) a public way or a way which the municipal clerk certifies is maintained and used as a public way,
>
> (b) a way shown on a plan approved and endorsed in accordance with the Subdivision Control Law, or
>
> (c) a way in existence when the Subdivision Control Law took effect in the municipality having, in the opinion of the Planning Board, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use and for the installation of municipal services to serve such use.

In determining whether a lot has adequate frontage for zoning purposes, many zoning bylaws contain a definition of "street" or "way" which includes the types of ways defined in the Subdivision Control Law. The fact that a lot may abut a way which has been approved by the Planning Board pursuant to the Subdivision Control Law does not mean the lot complies with the frontage requirement of the local zoning bylaw.

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Recently, the court decided that when a zoning bylaw allows lot frontage to be measured along a way which has been approved under the Subdivision Control Law, the way must exist on the ground. As Judge Armstrong so succinctly opined in Shea v. Board of Appeals of Lexington, 35 Mass. App. Ct. 519 (1993), **"A fire truck cannot drive on a plan."**

In 1913, before the Subdivision Control Law was adopted in the town of Lexington, a subdivision plan was recorded in the Middlesex Registry of Deeds. One of the ways depicted on this plan was Rockville Avenue. Four adjacent lots shown on that 1913 plan and fronting on Rockville Avenue were conveyed to a Mr. Shea by deed in 1978. In 1978, an ANR plan was submitted to the Planning Board combining the four adjacent lots shown on the 1913 plan into two lots numbered lot 1 and lot 2, with lot 2 having 125 feet of frontage on Rockville Avenue. The plan, for some unexplained reason, received an ANR endorsement from the Planning Board. In 1991, Mr. Shea conveyed lot 1 and was granted registration of lot 2 by decree of the Land Court.

Shea was denied a building permit for lot 2. The Building Commissioner denied the building permit on the ground that Rockville Avenue, on which the lot fronted, was not a street as defined in the Lexington Zoning Bylaw. A portion of Rockville Avenue was a paved road which included the first ten feet in front of lot 2. The paving stopped at that point, and Rockville Avenue became a path, some fifteen feet in width, wooded on both sides, with boulders and ledge outcroppings, descending at an increasingly steep slope. The unpaved section of Rockville Avenue that bordered lot 2 was not suitable for vehicular traffic, except perhaps by four-wheel drive, all-terrain vehicles during nonwinter months.

Shea's argument was that the 125 feet of frontage on Rockville Avenue was frontage on a "street", as required by the Lexington Zoning Bylaw, because Rockville Avenue was a way shown on an approved subdivision plan.

The Lexington Zoning Bylaw required frontage on a "street." A "street" for the purposes of the zoning bylaw was defined as follows:

> (a) a public way,
>
> (b) a way shown on a previously approved subdivision plan, or
>
> (c) a way that predates subdivision control that has, in the planning board's opinion, width, grades, and construction suitable and adequate for vehicular traffic and the installation of utilities.

Although the Planning Board had endorsed the ANR plan in 1978, the Board never approved a definitive subdivision plan pursuant to Section 81U of the Subdivision Control Law which incorporated the portion of Rockville Avenue which Shea claimed constituted street frontage for lot 2. Shea raised an interesting argument. He claimed that Rockville Avenue had the status of a way shown on an approved subdivision plan once the Land

Court granted registration of lot 2 in 1991 because of the provisions found in Section 81FF of the Subdivision Control Law. With respect to registered land, Section 81FF provides in part that:

> ... the land court shall not register or confirm a plan of a subdivision ... which has been filed on or after February first, nineteen hundred and fifty-two, unless it has first verified the fact that the plan filed with it has been approved by the planning board, or would otherwise be entitled if it had related to unregistered land, to be recorded in the registry of deeds. The land court shall have jurisdiction in so far as affects land registered or to be registered or confirmed under chapter one hundred and eighty-five, to determine whether the subdivision control law has been complied with, and shall verify before registering or confirming any plan ..., that the plan ... is entitled to be recorded in accordance with the subdivision control law, and every plan heretofore or hereafter registered or confirmed by the land court pursuant to said chapter one hundred and eighty-five **shall for the purposes of the subdivision control law be deemed to be, and shall be invested with all the rights and privileges of, a plan approved pursuant to said law.**

Shea contended that since Section 81FF states that when a plan which has been registered or confirmed by the land court is deemed to have all the rights and privileges of a plan approved pursuant to the Subdivision Control Law, then, when he registered his lot, shown as bounded by Rockville Avenue, his plan must be treated as a plan approved under the Subdivision Control Law. If his plan is treated as an approved subdivision plan, then Rockwood Avenue is a way shown on a previously approved subdivision plan which meets the definition of "street" as defined in the Lexington Zoning Bylaw.

SHEA V. BOARD OF APPEALS OF LEXINGTON
35 Mass. App. Ct. 519 (1993)

Excerpts:

Armstrong, J. ...

> ... the court is required under § 81FF to verify only that a plan of subdivision either has been approved by the planning board "or would otherwise be entitled ... to be recorded in the registry of deeds." A plan endorsed "approval not required" under § 81P is entitled to recordation ... . If, as the plaintiff argues, registration elevates a § 81P endorsement to the level of a § 81U [definitive plan] approval, it is clear from the express language of § 81FF that it does so only "for the purposes of the subdivision

control law." At most, then, a registration under § 81FF, like a § 81P endorsement, gives the lots shown on the plan no standing as lawful lots under a zoning code. Even for purposes of the Subdivision Control Law, a planning board acts "properly [in] deny[ing] an 81P endorsement because of inadequate access, despite technical compliance with frontage requirements, where access is nonexistent for the purposes set out in § 81M. **Perry v. Planning Bd. of Nantucket**, 15 Mass. App. Ct. 144 (1983) (plan showing frontage on two paper ways, one an unconstructed "public way," the other shown on a Land Court plan but not constructed on the ground).

Not only for the good of the homeowner, but also for the safety of the public, a town can insist that homes not be built on lots lacking adequate access for fire trucks and emergency vehicles. Even if the plaintiff's argument is accepted and Rockville Avenue is in legal contemplation "a way shown on a plan previously approved and endorsed in accordance with the subdivision control law," ... the section on which the plaintiff's lot fronts does not exist in fact. A fire truck cannot drive on a plan. A zoning bylaw which requires frontage on a way shown on an approved plan must be understood, if the purpose of the by-law is not to be undermined, to require an actual way, constructed on the ground, not just a depiction of a way on a plan. The planning board's approval may have legal significance under the zoning by-law's definition of "street" if the way depicted on an approved plan has been constructed as approved (Rockville Avenue is shown on the assertedly approved plan as a way forty feet in width) but not where it has never been constructed at all.

The building commissioner and the board of appeals were correct in withholding a building permit for the plaintiff's lot so long as the section of Rockville Avenue on which it fronts remains unconstructed.

The Shea decision has raised an interesting question. Is an applicant entitled to a building permit for a lot fronting on a way which has been approved by the Planning Board under the Subdivision Control Law, where the way has not been constructed but an adequate performance guarantee exists which ensures that the roadway will be constructed?

The court looked at this issue when deciding whether lots shown on a plan had adequate frontage for the purposes of the Subdivision Control Law. In Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1993), the Board of Selectmen, acting as an interim Planning Board, approved a subdivision plan. The Selectmen did not specify any construction standards for the ways shown on the plan, nor did they specify the municipal services to be furnished by the applicant. The Selectmen also failed to obtain the necessary performance guarantee. At a later date, Richard submitted an ANR plan to the Planning Board where the proposed building lots fronted on ways shown on the previously approved

subdivision plan. The Planning Board refused to endorse the plan. The court found that to be entitled to an ANR endorsement, when the plan shows proposed building lots abutting a previously approved way, such way must be built, or the assurance exists that the way will be constructed in accordance with specific municipal standards. Although the Shea decision said that in order to have zoning frontage the way must be constructed on the ground, the decision did not address the issue whether there is zoning frontage when there is a performance guarantee in place which will ensure that the way will be constructed. An argument could be made, based on the Richard case, that zoning frontage exists where future construction of the way has been secured by an adequate performance guarantee obtained by the Planning Board pursuant to the Subdivision Control Law. However, a community may want to address this issue by amending its zoning bylaw or ordinance.

Where a zoning bylaw allows lot frontage to be measured along a way which in the opinion of the Planning Board has sufficient width, suitable grades, and adequate construction for vehicular traffic, there must be a specific determination by the Planning Board that the way meets such criteria. In Corrigan v. Board of Appeals of Brewster, 35 Mass. App. Ct. 514 (1993), the court determined that a lot abutting such a way does not have zoning frontage unless the Planning Board has specifically made that determination.

In Corrigan, the Planning Board had given an ANR endorsement to a plan of land showing the lot in question. At the direction of the Land Court, the Planning Board noted on the ANR plan that "No determination of compliance with zoning requirements has been made or is intended." At a later date, the Building Inspector denied a building permit because the lot lacked frontage on a "street" as defined in the Brewster Zoning Bylaw. The Brewster Zoning Bylaw defined a "street" in the following way:

> (i) a way over twenty-four feet in width which is dedicated to public use by any lawful procedure;
>
> (ii) a way which the town clerk certifies is maintained as a public way;
>
> (iii) a way shown on an approved subdivision plan; and
>
> **(iv) a way having in the opinion of the Brewster Planning Board sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed uses of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.**

The Building Inspector denied the building permit because the lot did not abut a public way which is over twenty-four feet in width as noted in (i) above. The Building Inspector's decision did not discuss whether the definition of street as defined in (iv) above was applicable to the lot in question.

On appeal to the court, Corrigan argued that the previous ANR endorsement by the Planning Board constituted a zoning determination by the Planning Board that the way shown on the plan had sufficient width, suitable grades, and adequate construction as required by the Brewster Zoning Bylaw. Corrigan's argument was that the Planning Board could not have given its ANR endorsement unless the Board determined that the lots shown on the plan fronted on one of the three types of ways specified in the Subdivision Control Law. Since the way shown on the ANR plan was not (a) a public way or, (b) a way shown on a plan approved and endorsed by the Planning Board in accordance with the Subdivision Control Law, Corrigan concluded that the Planning Board must have determined that the way was in existence prior to the Subdivision Control Law and had suitable width and grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of land and that determination also constituted the favorable determination by the Planning Board required by the Brewster Zoning Bylaw.

CORRIGAN V. BOARD OF APPEALS OF BREWSTER
35 Mass. App. Ct. 514 (1993)

Excerpts:

Gillerman, J. ...

The argument is appealing. If the Planning Board has in fact decided that a lot has adequate frontage on a "street" under § 81L of the Subdivision Control Law because it is adequate in all material respects for vehicular traffic, then it is wasteful, if not silly, not to extend that decision to the resolution of the same issue by the same board applying the same criteria under the Brewster zoning by-law.

Previous decisions of this court, nevertheless, have repeatedly pointed out that a § 81P endorsement does not give a lot any standing under the zoning by-law. See **Smalley v. Planning Bd. of Harwich**, 10 Mass. App. Ct. 599, 603 (1980). There we said, "In acting under § 81P, a planning board's judgment is confined to determining whether a plan shows a subdivision."... **Smalley**, however, involved a lot with less than the minimum area requirements, ... and we rightly rejected the argument that a § 81P endorsement would constitute a decision that the unrelated requirements of the Harwich zoning code had been met. ...

Another decision of major importance is **Arrigo v. Planning Bd. of Franklin**, 12 Mass. App. Ct. 802 (1981). There we held that § 81L is not merely definitional, but imposes a substantive requirement that each lot have frontage on a "street" for the distance specified in the zoning by-law, or absent such specification, twenty feet, and that § 81R gives the planning board the power to waive strict compliance with the frontage requirements

of § 81L, whether that requirement is twenty feet or the distance specified in the zoning by-law . We also held in that case that the waiver by the planning board under § 81R was valid only for the purposes of the Subdivision Control Law and did not operate as a variance by the zoning board of appeals under the different and highly restrictive criteria of G.L. c. 40A, § 10. ... . **Arrigo**, too, is different from the present case: there the criteria for the grant of the § 81R waiver by the planning board were different from the criteria for the granting of a § 10 variance, ... In **Arrigo**, there was no reason whatsoever to make the action of one agency binding upon the other.

Here, unlike **Smalley** and **Arrigo**, the subject to be regulated is the same for both the Subdivision Control Law and the Brewster zoning by-law (the requirement that the lot have frontage on a "street"), the criteria for a "street" are the same for both (a determination of the adequacy of the way for vehicular traffic), and the agency empowered to make that determination is the same (the Brewster planning board). The difficulty, however, is that the judge found - and we find nothing to the contrary in the record before us - that the Brewster planning board never in fact determined that the way relied upon by the plaintiffs was a "street" within the meaning of § 81L; the record is simply silent as to the route followed by the board in reaching its decision to issue a § 81P endorsement. Given the variety of possible explanations, we should not infer what the planning board did - as the plaintiffs would have us do - and certainly we will not guess as to the board's reasoning.

The last sentence of MGL, Chapter 41, § 81P provides that a statement may be placed on an ANR plan indicating the reason why approval under the Subdivision Control Law is not required. The endorsement of an ANR plan is a prerequisite to recordability of the plan and, as a practical matter, to marketability of the lots shown on the plan. As was noted by the court in SMI Investors(Delaware), Inc. v. Planning Board of Tisbury, 18 Mass. App. Ct. 408 (1984), if a Planning Board believes its endorsement may tend to mislead buyers of lots shown on the plan, they may exercise their powers in a way that protects persons who will rely on the endorsement.

Placing a statement on an ANR plan stating the reason for endorsement takes on added importance where a local zoning bylaw authorizes frontage to be measured on a "street" or "way" which in the opinion of the Planning Board provides suitable access. As was noted in Corrigan, in such situations a record must exist that clearly indicates that the Planning Board has made such a determination. Before endorsing such a plan, we would suggest that a Planning Board make a determination that the way shown on the plan provides suitable access and then place a statement on the ANR plan indicating that they have made such a determination.

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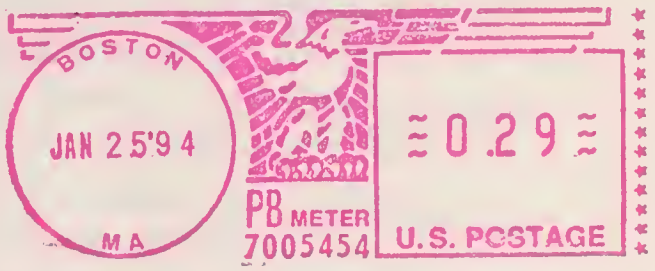

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